NO. 7781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES DEMMERT, for himself and all other taxpayers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One At Juneau

Brief of Appellant in Support Thereof

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STATEMENT OF THE CASE

This case is to test the validity of Chapter 65 Session Laws of Alaska, 1929, as amended by Chapter 89 Session Laws of 1933 wherein it is alleged that Indians as a race are excluded in express terms and by necessary implication from the benefits provided therein.

THE AMENDED COMPLAINT

The issue comes before this court on demurrer and hence the allegations of the amended complaint must be taken as true.

and that plaintiff has no plain, speedy or other adequate remedy at law.

THE DEMURRER (R. 10)

The defendant, appellee herein, demurred on four grounds—

1) that the court had no jurisdiction of the person of the defendant or the subject of the action;
2) That the Territory of Alaska, the real party in interest against which the injunction is sought, cannot be sued without its consent;
3) that the plaintiff has no legal capacity to sue;
4) the complaint does not state facts sufficient to constitute a cause of action or to entitle the said plaintiff to the relief, or any relief therein demanded.

The appellee confined his argument (both oral and his brief) to the single point, to wit, that the Territory of Alaska cannot be sued without its consent.

The court sustained the demurer without rendering an opinion.

This appeal is from that judgment sustaining the demurrer and dismissing the complaint. (12-13 R.)

SPECIFICATION OF ERRORS

Appellant contends that the action of the District Court should be reversed because none of the

grounds of demurrer is well taken and that the court erred in sustaining them.

DEMURRERS No. 1 and 2.

1) That the court has no jurisdiction of the person of the defendant or the subject matter of the action;
2) that the Territory of Alaska, the real party in interest against which the injunction is sought, cannot be sued without its consent.

These two grounds constitute but one ground according to our statute (sec. 3416 CLA 1933) and the second is not statutory. However the second demurrer indicates on what the defendant relies, and leads us to the question—

WHO IS THE REAL DEFENDANT?

In the early case of Osborn v. U. S. Bank (22 U.S. 846 to 859), the Supreme Court considered a very similar demurrer presented in this form by the court;

> "We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction." * * * The argument was that * * * "The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially,

though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the Court. But this was not in the power of the Bank. * * * the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the state, and on the property in their hands." * * * "The plain and obvious answer is, because the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record. * * *

"This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named." * * *

"But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. * * *

"The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

> " * * * It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the state of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

On the question then, whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendant Walstein G. Smith, the case of Osborn v. U. S. Bank, supra, is a precedent and is allowed in all cases where the act is ministerial.

> Marbury v. Madison, 1 Cranch 137;
> Kendall v. United States 12 Peters 524;
> The Com. of Patents v. Whiteley 4 Wall. 522;
> Gaines v. Thompson 74 US 347.

It is not necessary here to distinguish between what is a ministerial duty and one charged with discretion beyond referring to an accepted definition of what constitutes a ministerial duty. We take it from Gaines v. Thompson 74 U. S. 352 that

> "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

Can anybody imagine a case that is more simple and definite than that of paying a check or warrant

drawn by a proper authority such as in the case at bar?

The Supreme Court in Osborn v. U. S. Bank, supra, has noted the difficulties that could arise if the rule sought to be established by appellee were the law. And not only in that case but also in the case of Cunningham v. Macon (109 US 447) it laid down the better rule and stated the reason in the following words;—

> "But in the desire to do justice, which in many cases the court can see will be defeated by an unwarranted extension of this principle (that a sovereign may not be sued without its consent), they have in some instances gone a long way in holding the state not to be a necessary party, though some interests of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration."

The court then listed three classes of cases wherein jurisdiction would be entertained with the first two of which we are not concerned (1) where property in which the state has an interest, comes before the Court and under its control without being forcibly taken from the possession of the government; (2) where an individual is sued in tort and defends on the ground that he has acted under orders of the government.

The third class is in point and

> "is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public offices as in the case of Marbury v. Madison, 1 Cranch 137, et al. * * * It has been insisted that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty with the plaintiff's rights in the premises."

The court then cited the case of Davis v. Gray, 16 Wall. 203, in which the court enjoined the governor of the State of Texas and the Commissioner of the State Land Office from issuing certain deeds not authorized by law.

In Osborn v. U. S. Bank, supra, a preliminary injunction was allowed by the court to restrain a state officer from placing money in the treasury of the State. It was admitted that the real party at interest was the State of Ohio and that Osborn was merely an agent thereof.

The two phases of the question was raised by two

separate actions both founded on the same law, the case of Board of Liquidation v. McComb, 92 US 531, wherein an injunction issued to restrain the Board of Liquidation from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, and the case of Louisiana v. Jomel, 107 US 711, wherein injunction was refused for lack of jurisdiction.

In the former case, McComb was the owner of some new bonds already issued and sought to prevent an exchange of new bonds for other bonds not included within the purview of the statute. Mr. Justice Bradley rendered the opinion of the Court and laid down the rule and its limitations thus;—

> "The objections to proceeding against state officers by mandamus or injunction are, first, that it is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done.
>
> A state, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In the Jomel case, the owners of the new bonds sought to compel the Auditor of the state and the Treasurer of the state to pay out of the treasury of the state the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of government. In this they asked that the officers be commanded to pay, out of the moneys in the treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government.

The reason for the opposite conclusions in these two cases which superficially appear to be identical is this—in the former case, the court prohibited certain officers from performing an unlawful act because of the illegality of the directing law whereas in the latter case the court was asked to interfere where the officers were privileged to use their discretion.

It was not the statute that had changed, but the relation of the parties to it. "There was no jurisdiction in the Circuit Court either by mandamus at law, or by a decree in chancery, to take charge of the treasury of the State, and seizing the hands of the auditor and treasurer, to make distribution of the funds in the treasury in the manner which the court might think just." 109 US 456.

The learned Justice then uses the language on which the appellee relied in the court below;—

> "The treasurer of the state is the keeper of the money collected from this tax. * * * He holds them only as agent of the state. If there is any trust the state is the Trustee and unless the state can be sued the trustee cannot be enjoined."

The principle herein expressed was applied in two Alaska cases both decided by the late Judge Reed. In the case of Pacific American Fisheries v. Territory of Alaska and Walstein G. Smith as Treasurer (7 Alaska 149) the injunction was denied and follows the Jomel case. There was no duty on the Treasurer. He was simply there. He "is not authorized to do or perform any act with reference to the enforcement of the penal or other provisions of the acts for the collection of the taxes levied." * * * but "if the action is against W. G. Smith in his individual capacity, or as an agent attempting to enforce an invalid law of the territory, or as an officer attempting to enforce an invalid law of the territory, a different question would arise, and the action would not be dismissed." 7 Alaska 149.

The reverse of this principle was applied by Judge Reed in the case of Wickersham v. Walstein G. Smith, as Treasurer of the Territory wherein Smith was enjoined from expending money not at all different from the case at bar. As in the Wickersham case, so in this case, Mr. Smith has a simple minis-

terial duty to perform involving no discretion whatever, namely, upon the presentation of a warrant drawn by some other proper authority (section 1783 CLA 1933 for the aged and sec. 1821 CLA 1933 for the destitute mothers) appellee Smith as Treasurer has a positive duty that admits of no discretion but to sign and pay the warrant so drawn.

We are asking that the appellee be enjoined from acting under an invalid statute and the Territory is not a necessary party to the action.

DEMURRER NO. 3

"That the plaintiff has no legal capacity to sue."

This point was neither argued by the appellee in the court below nor touched upon in his brief to the court.

In its simplest terms this demurrer means this: May a taxpayer and citizen of Alaska sue to enjoin the payment of money under an invalid statute.

It is clear that such a person may enjoin action on the part of a municipal or state officer.

101 US 601, 609	—Crampton v. Zabriskie;
138 US 389	Brown v. Trousdale;
158 US 456	Calvin v. Jacksonville;
168 US 224, 236	Ogden City v. Armstrong;
253 US 221, 224	Hawke v. Smith.

On the theory that in respect to taxation, a Territory is like a municipality, we would say that the relation of a taxpayer to a territory is the same as

that of a taxpayer to a municipality. In the case of Talbott v. Silver Bow Co., 139 US 438, 445, the Supreme Court said of a territory;—

> "It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization. Who would contend, in the absence of express legislative provision therefor, that a bank created by or under the laws of a State, and located and doing business in a city of that State, could claim exemption from municipal taxation upon its property? * * * The only ground on which exemption from such taxation can be based, in the absence of express legislative provision, is that the tax proceeds from a distinct and independent sovereignty. As the reason for the rule of exemption of a national bank from state taxation fails in respect to a bank located in a Territory, the rule also fails."

This is the principle our District Judge had in mind when he took jurisdiction in the case of Wickersham v. Walsten G. Smith, as Treasurer (7 Alaska 538).

This is the rule in all cases where the taxpayer appears against a defendant not having the status of a State.

Talbott v. Silver Bow Co., 139 US 438, 445;
Bradfield v. Roberts; 175 US 292;
Massachusetts v. Mellon 262 US 486;
Wickersham v. Smith 7 Alaska 522;
Crampton v. Zabriskie 101 US 601, 609;
Brown v. Trousdale 138 US 389.

There were two phases of the Bradfield v. Roberts case going to the court's jurisdiction, (1) did the court have jurisdiction as to the defendant Roberts, the treasurer of the United States; (2) did the court have jurisdiction in a case where the capacity of the plaintiff to sue as a taxpayer was raised. In both issues the court took jurisdiction.

But in some jurisdictions (state of Washington for example) the plaintiff would not have a capacity to sue the State he being interested merely as a taxpayer. The reason is that the statutes charge the attorney general with that duty.

> "To prevent just such results (the possibility of suits by private citizens) and to protect the interests of the public the statute has provided for the election by the taxpayers of an officer—the attorney general—who is especially clothed with authority to institute proceedings of this kind * * * that it is his duty among other things 'to enforce the proper application of funds appropriated to the public institutions of the Territory'." Jones v. Reed 27 Pac. 1067-1069.

This is not true in Alaska. We find the statute thus—

"Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory of a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law. And such proceeding may be had for that purpose either by means of suits to restrain, or by means of action to compel, the enforcement of such law, or by any other appropriate proceeding that will bring the question at issue fairly before the court. Or, the Attorney General may for such purpose institute or defend actions or suits for private individuals or corporations, and at the expense of the Territory, whenever the importance of the questions involved to the inhabitants of the Territory shall warrant it; but no such proceeding shall be instituted or maintained in the name of the Territory or at its expense except with the approval of the Governor, Auditor and Treasurer or any two of them in the manner hereinafter provided." Section 666 C. L. A. 1933.

The Attorney General by his demurrer says we have no case and defends the constitutionality of the statute. Even if he were of the opinion that the statute is unconstitutional, the foregoing law places no duty on him for it is merely permissive and not mandatory. And even if he believe the law unconstitutional, he must abide the action of a controlling board as follows;—

"When in the opinion of the Governor, the Auditor and the Treasurer, or any two of them, it shall be for the best interest of the people of the Territory, or the Territory itself, to commence any action, hearing or other proceeding before any court, tribunal, board or commission, or any other authority, they shall so direct the Attorney General under the hand of the Governor, and the Attorney General shall proceed as directed, if in his opinion the action or proceeding can be prosecuted with success. If his opinion is adverse to such action he shall set forth the reasons for the same and embody his opinion and the correspondence in regard thereto, in his biennial report to the legislature." Sec. 667 CLA 1933.

This is quite different from the case of Jones v. Reed, 27 Pac. 1069, where the Court pointed out that the Attorney General even while Washington was a territory was charged with the duty "to enforce the proper application of funds appropriated to the public institutions of the territory."

The nearest approach to this in Alaska is found in section 662 Compiled Laws of Alaska, 1933, where the attorney general has the duty to make "recovery of money illegally paid or property converted."

DEMURRER NO. 4

The fourth demurrer is "That the complaint does not state facts sufficient to constitute a cause of action or to entitle the said Plaintiff to the relief, or any relief therein demanded."

This ground too was neither argued by the defendant nor included in his brief submitted to the court, and we think it should be dismissed under our rule—

> "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so it may be disregarded. It may be taken to the whole complaint or to any of the alleged cause of action stated therein." Sec. 3416 CLA 1933.

This statute was taken from the Oregon laws which was interpreted by their Supreme Court thus—

> "The object of the legislature in requiring the demurrer to state the grounds of objection to the complaint was to give the opposite party notice of the alleged defect. * * * It can never be upheld as an orderly proceeding in a court, while trying an issue of law, to find upon that issue in favor of one party, and to hold that there were other reasons, not involved in the issue, why judgment should be rendered against him." Marx et al v. Croisan 21 Pac. 310.

The same demurrers were filed against the original complaint and were sustained in the same manner there being no notice whatever to appellant as to the alleged defect in the complaint, nor was there any indication if all the grounds were good or if but one.

Appellant left to his own devices attempted to

cure whatever objection the District Court might have had and filed his amended complaint but to no purpose. His request for enlightenment from a bench which had formed its opinion was met with a repetition "The demurrer is sustained." Whether there is a defect on this fourth ground or on the preceding grounds, appellant does not know and not even the respectful citation of the Oregon decision was sufficient to secure from the District Judge what this appellant thinks was his due.

Proceeding on the theory that it was this last demurrer that caused the district judge to sustain the demurrer, appellant will now give it his attention.

The complaint alleges discrimination.

The fact of discrimination is apparent on the face of the law. The Governor may grant relief to the mother of any child under 16 years of age except to native (meaning Indian) children who are eligible for provision by the Department of the Interior—sec. 26 ch. 46 SLA 1933. It is not a question of excluding native children who are provided for by some other agency. It excludes native children only who might be the recipients of the bounty of another agency. Should the legislature not have been satisfied with the law as it was without the exception? Would it not be understood that if anybody, whether native or white, were the recipients of aid by any agency, governmental or otherwise, that

such a person would not qualify except to the extent that the "need" existed by "clear and convincing evidence." That is the force of section 28 ch. 46 SLA 1923. However the prejudice or the greed of politicians was not satisfied with that situation for under the language of section 28 which was formerly the language of section 26, Indian widows were getting help from the Territory. And so the language was change in 1933 so that it is provided that if the mother of any native child who was eligible for provision, whether provision was a fact or not, whether it was sufficient or not, that mother was outside the pale of Territorial aid from a fund supported by general taxation.

The legislature even then was afraid that the language of this exclusion might contain a loop hole and since many of them maintain that the Indians of Alaska are wards of the federal government, they caused the legislature to add these words (sec. 28) "or to any ward of the Government of the United States."

There has been no change in the policy of the legislature. When the so-called "Widow's pension act" was first passed (ch. 44 SLA 1923) the language was this—"That the mother of any white child" alone was eligible. The word "white" was stricken by chapter 67 of the Session Laws of 1925 at which time the legislature limited the act thus—"except the native Indian children of the Territory who are

provided for by the Department of the Interior out of funds of the Treasury of the United States."

Likewise in providing pensions for the aged destitute people of Alaska, the legislature by chapter 65 Session Laws of 1925 enacted the exclusion now found in section 28 of chapter 65 Session Laws of 1929 and now forming section 1823 Compiled Laws for 1933—viz., This Act shall not inure to the benefit of any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or to any ward of the Government of the United States.

This amendment replaced the more obvious discrimination against the Indian race in the law, viz.; "That the term 'resident' as used in this Act shall not be construed to include any native or other Indian" sec. 8 ch. 46 SLA 1923.

These laws of the Territory are all in violation of the Bill of Rights reenacted so that its terms would include the Territories of the United States by sections 41 of Title 8 United States Code in the following language;—

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to

like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

Shall we allow the Territory of Alaska to say that Natives a term by which Indians are always designated in Alaska shall not have the benefit of this statute? Or is there any sophistry by which the discrimination which exists in fact as charged in the complaint and admitted by the demurrer might be perpetuated?

"These laws were intended to secure political and legal equality to all citizens, but were not intended to establish social equality or to enforce social intercourse between different classes of citizens" (Fed. Cas. No. 18, 258,) and "to forbid the execution of state laws which by the act itself were made void" (Fed. Cas. No. 15,459). Even "an alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process and the equal protection of the law." Whitfield v. Hanges 222 Fed. 745; San Mateo County v. So. P. R. Co. 13 F 145.

This being a remedial and not a penal statute, it is to be liberally construed in order that the purpose of the Constitution might not be defeated in any way. U. S. v. Rhodes 1 Abb. 28.

The presentation of the legal issue involved, we think, is complete and covers all the possible issues raised by the appellee under a statute alleged

to be unconstitutional, and the court has jurisdiction over the appellee herein; the plaintiff has legal capacity to sue because he will be injured by the unlawful dissipation of money taken from him under the guise of taxation and paid to a special class to the exclusion of another class otherwise qualified, that there is nobody else upon whom the duty of preventing this waste rests and there is manifestly a wrong being perpetrated.

The complaint is sufficient and entitled the appellant to the relief demanded because he is a proper party beneficially involved, that the appellee has made and will continue to make expenditures under a statute that is unlawful, and that this wrong will continue unless this court enjoins the appellee from continuing these unlawful expenditures.

Respectfully submitted

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Attorney for Appellant.

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